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AMFINANCE BHD

v.

DATUK LIM SUH HUA

B

HIGH COURT MALAYA, KUALA LUMPUR
ZURA YAHYA JC
[SUIT NO: S5-22-1720-2003]
31 MAY 2010

C ***BANKING:*** *Securities for advances - Loan agreement - Default in repayment - Delay of over five years in lender commencing action against borrower - Whether breach of banker's obligation*

D ***BANKING:*** *Securities for advances - Loan agreement - Default in repayment - Loan granted for borrower to purchase property from developer - Whether lender should make claim against developer - Whether privity of contract between lender and developer - Whether assignment of property to lender under deed of assignment created tripartite relationship*

E ***CIVIL PROCEDURE:*** *Judgment and Orders - Enforceability - Whether judgment obtained by house buyer against developer can be enforced by lender*

F ***CONTRACT:*** *Breach - Agreement - Sale and purchase agreement - Termination of agreement by purchaser alleging construction not completed on time - Termination done before expiry of completion date - Wrongful and premature termination of agreement*

G ***CONTRACT:*** *Loan - Default in repayment - Assignment - Loan granted for borrower to purchase property from developer - Whether lender should make claim against developer - Whether privity of contract between lender and developer - Whether assignment of property to lender under deed of assignment created tripartite relationship*

H ***CONTRACT:*** *Privity of contract - Assignment - Loan granted for borrower to purchase property from developer - Whether lender should make claim against developer - Whether privity of contract between lender and developer - Whether assignment of property to lender under deed of assignment created tripartite relationship*

I ***LAND LAW:*** *Assignment - Deed of Assignment - Rights, titles and interests of purchaser under Sale and Purchase Agreement assigned to lender - Whether purchaser must obtain lender's consent to institute action against developer for breach of SPA*

The defendant had purchased three bungalows plots from the Developer. He had partly paid the purchase price and obtained a loan from the plaintiff for the balance. The loan agreement required the Developer to give an undertaking ('the undertaking') that the Developer was to refund all the monies received from the plaintiff in the event that the Developer failed to complete the construction works stated in the sale and purchase agreement ('SPA'). On 15 April 1999 the defendant issued a letter to the Developer to rescind the SPA on the grounds that the Developer had failed to complete the construction works on time. The Developer later issued a letter of vacant possession dated 7 September 2001 to the defendant to take delivery of the three bungalow lots. On 18 September 2001, defendant wrote to the plaintiff to stop them from releasing the balance of the loan amount to the Developer. The plaintiff acceded to the defendant's request. The defendant then brought an action against the Developer wherein judgment was entered for the defendant. It was also ordered that a sum of RM1,549,084.19 to be paid to the plaintiff. The Developer had been voluntarily wound up. The plaintiff commenced the present claim against the defendant pursuant to the defendant's default in the repayment of the loan under the loan agreement. The defendant contended, *inter alia*: (i) that the plaintiff should take legal action against the Developer based upon the undertaking which was said to be a collateral warranty or a contract of indemnity; (ii) that the plaintiff was in breach of its bankers' obligation as there was a five-year delay in bringing this action; and (iii) that the plaintiff had failed to mitigate its losses.

Held (allowing the plaintiff's claim with costs):

(1) There was no privity of contract which entitled the plaintiff to take legal action against the Developer. The contractual obligation between the plaintiff and defendant was under the loan agreement and between the defendant and the Developer was under the SPA. The fact that there was assignment of the right and interest of the property to the plaintiff by the defendant under the deed of assignment did not create any relationship between the plaintiff and the Developer nor did it create any tripartite relationship between all the three parties. (para 14)

(2) Even if there was a relationship between the plaintiff and the Developer, there was no proof which entitled the defendant to terminate the agreement with the Developer as the Developer had not breached any terms. The date of handing over vacant possession was only on or before 25 June 1999 whereas the defendant had terminated the agreement on 15 April 1999. With the defendant having wrongfully and prematurely terminating the SPA, the plaintiff was not entitled to take action against the Developer. (para 15)

(3) The judgment against the Developer was obtained in default. The plaintiff was never a party to the said suit. The defendant never requested for consent from the plaintiff when he instituted the action against the Developer. Thus, the plaintiff would not be able to enforce the judgment even though there was an order for the Developer to make payment to the plaintiff. Further, since the defendant had absolutely assigned his rights and interest in properties to the plaintiff but had not obtained consent of the plaintiff when he instituted the action against the Developer, he therefore could not bring the action against the Developer. Since the plaintiff was not entitled to take legal action against the Developer therefore it followed that the plaintiff had not breached the bankers' obligation. (para 21)

(4) The plaintiff was at liberty when it wished to institute an action against the defendant, subject only to the provisions in the Limitation Act 1953. (para 24)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Legislation referred to:

Contracts Acts 1950, s. 77

For the plaintiff - Pramjit Singh; M/s KK Lim & Assoc
For the defendant - J Karupiah; M/s Karupiah & Co

Reported by Amutha Suppayah

JUDGMENT

Zura Yahya JC:

[1] The plaintiff's claim against the defendant is pursuant to a loan agreement dated 19 September 1996 whereby the defendant has defaulted in the repayment of the loan. The loan was an end financing facility to complete the sale and purchase of three bungalow plots bought by the defendant from Alamanda Development Sdn Bhd (formerly known as MBf Country Homes Resorts Sdn Bhd) (the Developer) on 26 June 1996.

[2] In the loan agreement (pp. 97 to 131 of bundle A) in particular cl. 6.01, it provides that the interest, on the disbursed amount released, needs to be paid until the commencement of the monthly instalment. The last payment made by the defendant in respect of the interest was on 16 March 1999. Also not in dispute are that the end financing shall be released to the Developer progressively according to the stages of work that have been completed and the plaintiff has obtained a deed of assignment absolute and power of attorney from the defendant.

[3] During the trial the plaintiff and the defendant called upon one witness each to testify. Encik Nor Hisham bin Hashim (PW1) an officer with the plaintiff had testified and the defendant testified for himself.

[4] PW1's evidence was that the defendant had taken a loan for a sum of RM1,080,000 from MBf Finance Berhad to finance the purchase of three plots of land in Kulim, Kedah known as Padang Meha-Orchard Bungalow Homestead. According to the witness this action was taken because the defendant was in arrears for the payment of interests and when the demand for it was made defendant failed to remedy. Hence the plaintiff terminated the facility and claimed for the sum that had been released together with late payment charges and interest.

[5] In cross-examination PW1 stated that the plaintiff had no record about the defendant's letters dated 15 April 1999 (pp. 132 and 133 of bundle A) regarding the termination of the sale and purchase agreement with the Developer. As for the letter dated 18 September 2001 (pp. 134 and 135 of bundle A), PW1 stated that the plaintiff did receive it and the plaintiff thereafter had stopped making payment to the Developer.

[6] PW1 also stated during the cross-examination that the plaintiff had not taken any steps to claim from the Developer as regard to their (ie, Developer) undertaking to refund the monies. PW1 also stated that the plaintiff had not taken any action in respect of the properties after the defendant had defaulted in his payment to the plaintiff.

[7] The defendant's evidence was that he had purchased three bungalows plots from the Developer. He had paid 10% deposit for each plot and had made an additional payment of RM312,732. For the balance of the purchase price he had obtained a loan for a sum of RM1,080,000 from MBf Finance Berhad. In the loan agreement with MBf Finance Berhad there was a condition imposed that the Developer had to give an undertaking that they (Developer) had to complete all the construction work and to obtain the final certification of completion of work, and the Developer was to refund all the monies received from MBf Finance Berhad in the event that the Developer failed to complete all the construction works stated in the sale and purchase agreement. This undertaking could be seen in section 5.02(i)(iii) of the loan agreement.

[8] The defendant went on to state that he was not satisfied with the work progress at the site since they were slow. He estimated that the Developer would not be able to fulfil their obligation under the sale and purchase agreement. Hence on 15 April 1999 he issued a letter to the Developer (p. 133 of bundle A) to rescind the sale and purchase agreement since the Developer had breached the said agreement. On the same date, the defendant had issued a letter to MBf Finance Berhad enclosing his letter to the Developer and giving notice for the refund of the interests that he had paid, as well as informing that he would not be making any further payment. This letter is at p. 132 of bundle A. According to the defendant, he did not receive any reply from the Developer or MBf Finance Berhad to the letter which he sent to them. Hence on 11 October 1999 he sent another letter to them asking them to reply to his earlier letter. The Developer still did not reply but Messrs Raja Nor & Su Lynn (solicitor for MBf Finance Berhad) in their letter dated 16 November 1999 demanded payment for the arrears in the payment of the instalments.

[9] On 18 September 2001, the defendant stated that he instructed his solicitor, Messrs Ong & Manecksha to write to MBf Finance Berhad to stop them from releasing the balance of the loan amount to the Developer. And the defendant stated that he knew the balance of the loan amount had not been released.

[10] The defendant had also given evidence that he had brought an action against Alamanda Development Sdn Bhd at the Penang High Court *vide* Civil Suit No. 22-10-2004. On 2 April 2004 judgment had been entered whereby the defendant was to be paid a sum of RM467,480 and also interest on this sum. It was also ordered that a sum of RM1,549,084.19 inclusive of interest imposed to be paid to Am Finance Bhd.

[11] Further evidence by the defendant was as regard to the voluntary winding-up of Alamanda Development Sdn Bhd.

[12] The main issue raised by the defendant is that the plaintiff should take legal action against the Developer based upon the undertaking as provided in section 5.02(i)(iii) of the loan agreement. Section 5.02(i)(iii) titled "Conditions Precedent To Disbursement" is as follows:

> Notwithstanding Section 5.01, the obligation of the lender to make available any Drawing or disbursement thereof is also subject to the following conditions:
>
> (i) The Developer has consented in writing to the Assignment and the Developer has undertaken:
>
> (i) ...
>
> (ii) to complete the construction of the Property and to obtain the final certificate of completion of the Property; and
>
> (iii) to refund the Loan to the Lender in the event of non-compliance of its undertakings stated immediately above;

[13] Learned counsel for the defendant had submitted on the legal effect of the abovementioned undertaking clause and was of the view that it was a collateral warranty and could be enforced against the Developer. Also the undertaking was a contract of indemnity as referred to in s. 77 of the Contract Acts 1950 and the plaintiff being the indemnity holder had the statutory protection to recover all losses from the indemnifier ie, the Developer

pursuant to s. 78 of the same Act. And the intention of the parties was that the Developer should assume the primary obligation to indemnify the plaintiff in the event of a default by the Developer. It was further submitted that the undertaking was intended as a fundamental term of the loan agreement. And where the term which had been flouted was fundamental to the contract, the defendant which was the innocent party was entitled to treat himself as being discharged from further obligation under it.

[14] The above submission is not applicable to the facts in this case. As pointed out by learned counsel for the plaintiff the Developer had issued a letter of vacant possession dated 7 September 2001 to the defendant to take delivery of the three bungalow lots. This was as stated in the letter dated 18 September 2001 (p. 135 of bundle A) by the defendant's solicitors. In the said letter the defendant also notified the plaintiff not to disburse the final sum requested by the Developer which the plaintiff then acceded to the defendant's request. That being the facts there is no privity of contract which entitled the plaintiff to take legal action against the Developer. The contractual obligation between the plaintiff and defendant is under the loan agreement and between the defendant and the Developer is under the sale and purchase agreement. The fact that there is assignment of the right and interest of the property to the plaintiff by the defendant under the deed of assignment does not create any relationship between the plaintiff and the Developer nor it creates any tripartite relationship between all the three parties.

[15] Even if there is a relationship between the plaintiff and the Developer, the next issue to be considered is whether the Developer has breached any terms which entitled the plaintiff or defendant to take any legal action. The defendant in his letter dated 15 April 1999 which he alleged he had sent to the Developer had stated the Developer had breached the terms of the sale and purchase agreement. In the said letter defendant stated that the work was not completed up to 90% as claimed in the professional certificate and the Developer had breached the undertaking to deliver and maintain the orchard plots for him. The defendant, however, was unable to provide any proof that the Developer would not be able to meet their obligation to deliver vacant possession which would be due on or before 25 June

1999. What was before the court was the statement of the defendant that based on his experience the Developer would not be able to fulfil their obligation within the period of the delivery. Since there is no proof which entitled the defendant to terminate the agreement with the Developer as the Developer had not breached any terms as yet since the date of handing over vacant possession was only on or before 25 June 1999, the defendant had therefore wrongly terminated the agreement on 15 April 1999. A B

[16] Further, from the evidence adduced, it can be seen that the defendant was mistaken in his claim that the Developer would not be able to deliver vacant possession because there was no connection of water and electricity supply by the Developer. This is because in the Schedule of Payments (ie, pp. 19, 51 and 83 of bundle A) it does not show the requirement or mention of water and electricity connection, instead it states about the completion of earthworks, planting of fruit trees and commencement of drain fronting. C D

[17] As to what had been stated by the defendant in his letter of 15 April 1999 (p. 133 of bundle A) concerning the claim that 90% of the works stated in the Schedule of Payments was not the accurate position, this cannot be made an issue of. This is because cl. 7.2 of the sale and purchase agreement states that such certification shall be proof of the fact that the works referred therein has been completed. Except for the said letter of 15 April 1999, defendant had not written any letter to the architect or engineer questioning about correctness of the certification for work done when according to him the Developer had delayed or abandoned the works. Premised on these factors, it is not open to the defendant to say that the Developer had breached the term of the sale and purchase agreement regarding the progress of works carried out. E F G

[18] With the defendant having wrongfully and prematurely terminated the sale and purchase agreement, the plaintiff is not entitled to take action against the Developer since there is no proof of breach by the Developer. Further, the defendant through his solicitor's letter dated 18 September 2001 had mentioned about the 10% liquidated damages for the late delivery of the vacant possession. In the said letter there was no mention about the letter of rescission dated 15 April 1999. The effect of this action by the defendant is that the sale and purchase agreement is affirmed and not terminated/rescinded. H I

[19] In *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 the Federal Court has dealt with the issue of whether the respondent/purchaser as the innocent party is entitled to rescind the contract. The facts of the case were that the respondent had purchased a shop lot from the appellant which according to the agreement entered into by the parties, the appellant was to deliver the lot on or before 23 November 1998, and if the appellant delayed in making delivery, to pay liquidated damages. The appellant did not make delivery within the stipulated time or other subsequent dates which it had assured to the respondent. The respondent then commenced proceedings claiming, *inter alia*, a declaration that the agreement had been rescinded and for an order that the appellant refund the monies in its hand. There was also a claim for damages. The Federal Court held as follows:

> (2) … At common law a right to rescind a contract arises only where there has been a total failure of consideration. The test is whether the party in default has failed to perform his promise in its entirety.
>
> (3) Under s. 40 of the Act, the right in a non-defaulter to repudiate a contract only accrues when the defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract.
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> (5) The appellant did construct the tower block in which the respondent's unit was located. But it did not complete the construction within the specified time. There was a delay in the delivery of vacant possession and for that breach the contract itself provided a remedy – the payment of liquidated damages. This was not a case where there had been a total failure of consideration.
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> (8) On a proper construction of the agreement, time was not of the essence. The respondent was not entitled to terminate the contract. All that it was entitled to receive was compensation calculated on the agreed basis. Its purported termination of the agreement was therefore wrongful.

[20] Going by decision in the above-mentioned authority, the defendant's purported rescission of the agreement in his letter dated 15 April 1999 would therefore be wrongful since there was no total failure of consideration by the Developer which entitled

the defendant to rescind the agreement. Hence the defendant's contention that the plaintiff should take legal action against the Developer to claim the entire monies be paid back would not succeed.

[21] The defendant had adduced evidence that he had obtained a judgment against the Developer in the Civil Suit No. 22-10-2004 at Penang High Court. In the judgment (pp. 142 and 143 of bundle A) the Developer was ordered to pay a sum of RM467,480 to the defendant as well as monies owing to the plaintiff in the amount of RM1,549,084.19 to be repaid back by the Developer to the plaintiff. The said sum RM467,480, according to him, was the amount he had paid to the Developer. As it can be seen from the judgment, it is a judgment obtained in default. Also it can be seen that the plaintiff was never a party to the said suit. And as admitted by the defendant he never request for consent from the plaintiff when he instituted the action against the Developer. By not being a party to the suit it would mean that the plaintiff would not be able to enforce the judgment even though there was an order for the Developer to make payment to the plaintiff. Further, since the defendant had absolutely assigned his rights and interest in properties to the plaintiff but had not obtained consent of the plaintiff when he instituted the action against the Developer, he therefore could not bring the action against the Developer. In this circumstances, judgment obtained by the defendant against the Developer lacked enforceability.

[22] The other issue raised by the defendant was that the plaintiff was negligent in handling the defendant's account. This was in respect of the breach of bankers' obligation and the five years delay in bringing this action against the defendant.

[23] In respect of the breach of bankers' obligation, learned counsel submitted that the plaintiff owed a duty of care towards the defendant and plaintiff should have sued the Developer based on the Developer's undertaking. On this point I like to reiterate what I have stated earlier concerning the undertaking provided for in section 5.02(i)(ii) and (iii) of the loan agreement. Since I am of the view that the plaintiff is not entitled to take legal action against the Developer therefore it follows that the plaintiff has not breached the bankers' obligation.

[24] As for the five years delay, learned counsel for the defendant submitted that the plaintiff in taking action only on 15 October 2003 even though it had received the last payment on 16 March 1999 and the termination was on 15 April 1999, the plaintiff had therefore acquiesced and hence was estopped from suing the defendant. Evidence that had been adduced were that the defendant had sent the letter of termination of 15 April 1999 by ordinary mail and he had not got any acknowledgement from the plaintiff nor the Developer. The plaintiff's witness testified that the plaintiff did not have in their record the said letter nor the letter which the defendant through their solicitor (page 7 of bundle C) sent to Messrs Raja Nor & Su Lynn their solicitor then. However PW1 confirmed that p. 8 of bundle C was a letter of demand from their then solicitor. This letter of demand to the defendant was dated 16 November 1999. In view of all these evidence and as pointed out by PW1 that according to s. 11.01(a) of the loan agreement whereby defendant was required to make payment whether formally demanded or not, the plaintiff is therefore at liberty when it wishes to institute an action against the defendant but of course subject to the provisions in the Limitation Act 1953.

[25] The next issue raised by the defendant was the plaintiff's failure to mitigate losses. This was on the basis that the plaintiff was in possession of the Deed of Assignment and the Power of Attorney over the three bungalow lots. No explanation was given by the plaintiff why these properties have not been disposed after the sum became due and owing. Despite the absent of an explanation by the plaintiff, the plaintiff cannot be faulted since the plaintiff has the discretion as to whether to proceed with legal action or to foreclose the properties. In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, Gopal Sri Ram JCA (as he then was) has at p. 56 stated:

> Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively.

[26] For all the reasons stated the defendant cannot be exempted or avoided from the liabilities arising from the loan agreement which he has entered into. Accordingly the plaintiff's claim is allowed with costs.